

IN THE SUPREME COURT OF OHIO

Elyria Foundry Company,

Appellant,

v.

The Public Utilities Commission of Ohio,

Appellee.

WPS Energy Services, Inc.,

Appellant,

v.

The Public Utilities Commission of Ohio,

Appellee.

Case No. 2006-830

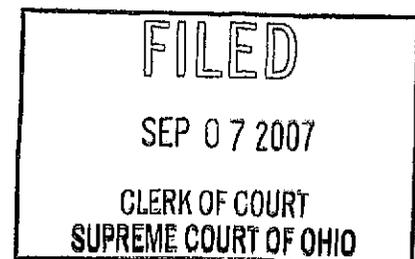
On Appeal from The Public Utilities
Commission of Ohio,
Case Nos. 05-704-EL-ATA, 05-1125-
EL-ATA, 05-1126-EL-AAM, 05-1127-
EL-UNC

MOTION FOR RECONSIDERATION OF INTERVENING APPELLEE FIRSTENERGY
CORP., ON BEHALF OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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**MOTION FOR RECONSIDERATION OF INTERVENING APPELLE
FIRSTENERGY CORP., ON BEHALF OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE
TOLEDO EDISON COMPANY**

In its August 29, 2007 decision, the Court affirmed the Commission's orders in the case below in all respects but one: the Court found that the Rate Certainty Plan ("Plan") approved by the Commission violated R.C. 4928.02(G) because the Plan permitted, at a future date, the collection of deferred fuel costs through distribution rate cases. FirstEnergy Corp., on behalf of its Ohio operating companies, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the "Operating Companies"), requests that the Court reconsider and modify its decision to find that the Plan does not permit an anticompetitive subsidy in violation of R.C. 4928.02(G).

The Court concluded that permitting the collection of deferred fuel costs through a distribution charge constituted a subsidy in violation of R.C. 4928.02(G) because it authorized the "cross-subsidization between two of the three major electric-service components." *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶ 58. A review of the Plan and the Court's findings elsewhere in its Opinion, together with other provisions of Ohio law, does not support that conclusion.

There cannot be a violation of R.C. 4928.02(G) unless there is an *anticompetitive* subsidy. In its Opinion, the Court noted there are three major components of electric service: distribution, transmission, and generation and found that due to the Plan's recovery mechanism associated with fuel deferrals, that there was a subsidy between the distribution and generation components. Assuming for the sake of argument that a subsidy exists, that cannot be the end of the analysis. R.C. 4928.02(G) requires that there be an *anticompetitive* subsidy. As directed by R.C. 1.47(B), all words in an entire statute must be given effect. *Cleveland Elec. Illuminating Co. v. City of Cleveland*, 37 Ohio St.3d. 50, 524 N.E.2d. 441 (Ohio 1988). In its Opinion, the Court found that the Commission did not address the issue of whether the fuel deferral mechanism was anticompetitive. *Elyria Foundry v. Pub. Util. Comm.*, ¶ 55. This finding is not correct as evidenced by other findings in the Court's Opinion.

For an *anticompetitive* cross-subsidization to occur between these two elements, the Operating Companies would have to design rates with the intent of overstating the cost of distribution for the purpose of artificially understating the cost of generation so that marketers would be competing against an artificially low rate and thereby be disadvantaged competitively. Said another way, for there to be any anticompetitive subsidy, the Operating Companies rates would have to be designed to understate their cost of generation service to customers so that the

price against which marketers compete would be artificially lowered by the amount of the subsidy. From a statutory perspective, this would be relevant because if the cost of generation service is the price against which marketers compete, any subsidy lowering that price could be viewed as potentially anticompetitive, i.e. an anticompetitive subsidy. This is not what happens under the Plan, however. The shopping credit/avoidable charge is the price against which marketers compete – not the generation rate.¹ And, as this Court noted in its decision, *Id.* ¶ 73, the shopping credits do include amounts for the fuel recovery mechanism and deferred fuel costs. Therefore, by definition, the recovery of deferred fuel costs in distribution rates cannot be anticompetitive because the price the marketers compete against includes such deferrals. In effect, the Court’s decision confuses the issue of the component of the rate in which fuel deferrals are recovered with the issue of whether or not these amounts were included in the price against marketers which compete, i.e., the shopping credit/avoidable charge.

Far from not addressing the issue of anticompetitiveness, the Commission found and this Court noted in its Opinion that:

¹ The Court recently expressed its concern about including fuel costs in a distribution charge because customers must be able evaluate offers from competitive generators. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, ¶ 22. As described above, this concern is not applicable to the Plan, since competitive generators compete against the shopping credit – not the tariff generation rate, and customers are informed of their shopping credit on their monthly bill. Hence, recovery of fuel costs through a distribution charge under the Plan will not cause customer confusion.

“FirstEnergy’s ‘price to beat or evaluation price range’ that competitive retail service providers compete against should reflect the actual costs FirstEnergy incurs. The commission directed that the anticipated deferred fuel costs be included in FirstEnergy’s price to beat in order to provide a *level playing field* for providers interested in serving FirstEnergy’s service area. Moreover, as discussed later in this opinion, the rate-certainty plan also provides that shopping credits for the FirstEnergy companies will be increased to reflect increased fuel costs and the fuel deferrals booked each year of the rate-certainty plan.” *Id.* ¶ 66 (emphasis added)

The Commission separately addressed in its Order: 1) how fuel deferrals would be reflected in a wholesale competitive bidding process; and 2) how fuel deferrals would be included in the shopping credit/avoidable charge against which retail marketers would compete on a daily basis.

First, with regard to how the fuel deferrals would be reflected in the wholesale competitive bidding process, the Commission determined in its Order that the fuel deferrals should be reflected in the competitive bidding process, specifically concluding that “we find that the price to beat or the evaluation price range should be reflective of actual costs anticipated to be incurred by the Companies.” *Commission Order*, Case No. 05-1125-EL-ATA et seq., January 4, 2006, pp. 6-7. The Commission then directed that the fuel deferral be included in the Companies’ price in determining whether the winning bid price was lower than the Companies’ price to beat. As the Court correctly noted, the Commission took this action to achieve a level playing field for suppliers interested in serving the

Companies' load through the competitive bidding process. *Elyria Foundry Co. v. Pub. Util. Comm.*, ¶ 66.

Second, the Commission then separately addressed how the fuel deferrals would be included in the shopping credits/avoidable charges. *Commission Order*, Case No. 05-1125-EL-ATA et seq., January 4, 2006, p. 10. The Commission specifically considered the level of fuel deferrals to be included in the shopping credit, as had been established in the Stipulation among the parties, referred to as Joint Exhibit 1-B, and adopted the approach contained in the Stipulation. In its Opinion the Court correctly noted: "Contrary to WPS's argument, the rate-certainty plan provided that shopping credit will be increased to reflect not only the level of fuel-recovery mechanism but also the fuel deferral of Ohio Edison, Toledo Edison, and CEI." *Elyria Foundry Co. v. Pub. Util. Comm.*, ¶ 73.

As this Court itself concluded, including the fuel deferrals in the price to beat, the price against which suppliers in a competitive bidding process compete, creates a level playing field for competitors. *Id.* ¶ 66. Fuel deferrals have been included in the shopping credits, the price against which marketers compete on a daily basis. *Id.* ¶ 73. As these represent the only two ways in which a marketer can compete, there exists a level playing field for marketers, and no anticompetitive effect exists. Accordingly, there can be no violation of R. C. 4928.02(G).

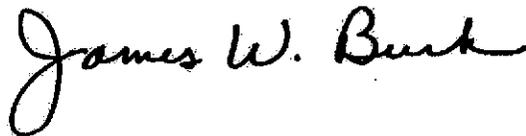
Since alternative suppliers actually compete against the level of the shopping credit, and not against what customers are currently paying for generation, the fact that part of the increased fuel cost was deferred to be collected in the future through distribution charges has no impact on alternative suppliers or competition. Only the level of shopping credit/avoidable charge is meaningful from a competitive perspective. Therefore, the Plan's design to recover deferred fuel costs through distribution charges is not anticompetitive. Because deferred fuel costs were addressed through the shopping credit approved by the Commission, the underlying mechanism to actually recover those deferred fuel costs becomes irrelevant from a competitive standpoint.

The provision of the Plan that provides that to the extent that actual fuel costs are less than those revenues generated from the fuel-recovery mechanism that those revenues will be applied to reduce the amount of the distribution deferrals is also not anticompetitive. In fact, it enhances the advantage of marketers. This occurs because the shopping credit/avoided costs, the price against which marketers such as WPS compete, will be artificially high in circumstances in which this provision would come in effect. Stated another way, marketers can advantage their bottom line because they can raise their price because the price against which they compete is higher.

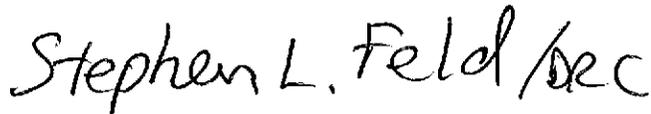
Even if the Court in considering this Motion maintains its finding that recovery of deferred fuel cost through a distribution rate case constitutes an anticompetitive subsidy in violation of R.C. 4928.02(G), the Court should still modify its Opinion and not remand the proceeding to the Commission. In this case, as noted by the Court, WPS was not prejudiced by the fuel deferrals. *Id.* ¶ 63. The Court specifically found that “WPS has not shown how it suffered prejudice as a result of the fuel deferrals.” *Id.* This Court has consistently held, most recently in the instant Opinion, that it “will not reverse a Commission order unless the party seeking reversal demonstrates the prejudicial effect of the order.” *Id.* ¶ 31. In this Opinion, the Court found that while the Commission violated R.C. 4903.09 due to having no factual basis to support its finding of exigent circumstances, reversal was unwarranted because Elyria Foundry did not demonstrate “prejudice with respect to the finding of exigent circumstances.” *Id.* The same reasoning and conclusion should apply to the Court’s finding of a violation of R.C. 4928.02(G) due to the lack of prejudice demonstrated by WPS as a result of the fuel deferrals.

For the foregoing reasons, the Operating Companies respectfully request that the Court modify its August 29, 2007 decision and find that the Plan was lawful in all respects, or in the alternative find that the violation of law does not warrant reversal due to the lack of prejudice.

Respectfully submitted,



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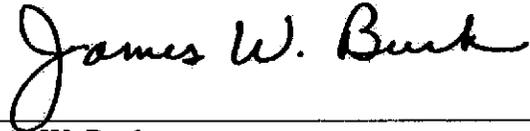


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration of FirstEnergy Corp., on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company was delivered to the following via regular U.S. mail this 7th day of September, 2007:



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